D.P.U. 92-122

Petition of Plymouth Rock Energy Associates, L.P., under the provisions of 220 C.M.R. § 1.04(5)(a) for summary judgment and injunctive relief to require execution of a long-run standard power purchase contract in accordance with 220 C.M.R. § 10.07(1).

APPEARANCES: Steven Ferrey, Esq.
Suffolk University School of Law
41 Temple Street
Boston, MA 02114
FOR: PLYMOUTH ROCK ENERGY ASSOCIATES
Petitioner

Eric J. Krathwohl, Esq.
Rich, May, Bilodeau & Flaherty, P.C.
294 Washington Street
Boston, MA 02108
FOR: COMMONWEALTH ELECTRIC COMPANY
Respondent

I. INTRODUCTION

A. Procedural History

On May 18, 1992, Plymouth Rock Energy Associates, L.P. ("PREA") filed with the Department of Public Utilities ("Department") (1) a Petition for Review ("Petition"), (2) a Motion for Expedited Summary Judgment and Injunctive Relief ("Motion"), (3) a Memorandum in Support of Petition and Motion ("PREA Memorandum"), and (4) an Affidavit of John A. Bersani. PREA is a limited partnership formed by the owners of the Independence Mall in Kingston, Massachusetts, to construct a five megawatt ("MW") natural gas-fired cogeneration facility adjacent to, and to provide steam to, the mall which is heated and cooled by electricity (PREA Memorandum at 3-5). PREA requests that the Department order Commonwealth Electric Company ("Commonwealth" or "Company"), in accordance with Department integrated resource management ("IRM") regulations, 220 C.M.R. § 10.07(1)(a), to negotiate and execute a Long-Run Standard Contract B with PREA for electric energy from PREA's proposed cogeneration project (Petition at 1).

On June 1, 1992, Commonwealth filed (1) a Response and Opposition to PREA Petition for Review ("Commonwealth Response"), (2) a Memorandum in Support of Response and Opposition to PREA Petition ("Commonwealth Memorandum"), (3) an Affidavit of Michael Renzi ("Renzi Affidavit"), (4) an Affidavit of Michael R. Kirkwood, and (5) a Response and Opposition to the PREA Motion. Commonwealth argues, in summary, that the Company should not have to sign a Long-Run Standard Contract B with PREA at the price requested, because the power is not needed and the price is not least-cost (Commonwealth Memorandum at 12-20).

On June 15, 1992, PREA filed its Reply to Commonwealth's Opposition to the Petition ("PREA Reply"). On June 19, 1992, Commonwealth filed its Response to the PREA Reply ("Commonwealth Reply").

On October 14, 1992, the Department submitted one information request to Commonwealth that was answered on October 22, 1992.

B. Background on Long-Run Standard Contract B

The Long-Run Standard Contract B prescribed by the IRM regulations has its origins in the Public Utility Regulatory Policies Act of 1978 ("PURPA"). 16 U.S.C. 824a-3; 18 C.F.R. §§ 292.303, 292.304. PURPA was passed by Congress in an effort to remove institutional and regulatory impediments facing the developers of cogeneration and small power production facilities that desire to sell electricity to public utility companies. However, PURPA also reflected a concern that prices to cogenerators and small power producers not exceed "the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. 824a-3.

The Department's QF regulations, 220 C.M.R. §§ 8.00 et seq., were promulgated pursuant to Sections 201 and 210 of Title II of PURPA. In keeping with the objectives of PURPA, the Department promulgated regulations for qualifying facilities ("QF") requiring each electric company to file a Long-Run Standard Contract B with the Department. 220 C.M.R. § 8.03(1).

On August 31, 1990, the Department issued its Order in D.P.U. 89-239, establishing the IRM regulations, which reflect a continuing belief that small power facilities have the

potential to provide significant long-term diversity and reliability benefits. However, because the administrative costs to developers and to purchasing electric companies of negotiating contracts for power from very small facilities may overwhelm those benefits, Section 10.07(1) was adopted to provide a simple, cost-effective and efficient mechanism for very small power producers and electric companies to complete contracts at reasonable prices for ratepayers.

C. Motion for Summary Judgment

The Department's procedural rules authorize the use of summary judgment in Department decisions. 220 C.M.R. § 1.06(6)(e). Summary judgment may be granted by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. Mass. Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass.App.Ct. 775, 785-786 (1980).

In determining whether to grant the PREA motion for summary judgment, the Department will review the initial pleadings, responses to discovery and the memoranda of the parties. Summary judgment will be granted by the Department if the review of these materials shows that there is no genuine issue of material fact in this case, and that the legal effect of the facts before the Department entitles either party to summary judgment. Massachusetts Rules of Civil Procedure, Rule 56.[1] Hull Municipal Light Plant, D.P.U. 87-19-A at 25 (1990); and IMR Telecom, D.P.U. 89-212, at 11 (1990).

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[1] Rule 56(c) expressly authorizes summary judgment against the moving party where appropriate.

II. POSITIONS OF THE PARTIES

A. PREA

PREA states that the Independence Mall is fully heated and cooled by electricity, and maintains that Commonwealth charges some of the highest electric rates in the country (PREA Memorandum at 4). PREA further asserts that many mall businesses have failed, and that the proposed cogeneration project is part of a new plan to operate the mall in a more efficient, cost-effective manner (id.).

PREA asserts that its proposed project qualifies under 220 C.M.R. § 10.07(1)(a) for a Long-Run Standard Contract B with Commonwealth[2] (Petition at 2). PREA states that it initiated discussions with Commonwealth in January, 1992, and that it tendered an offer to Commonwealth by letter dated April 21, 1992, to enter into a Long-Run Standard Contract B at a price equivalent to the weighted average stream of prices paid to Commonwealth's most recent final award group in accordance with 220 C.M.R. § 10.07(1)(a) (id.). PREA maintains that it experienced repeated delays in negotiations before Commonwealth ultimately

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[2] Department regulations implementing the IRM process provide, in part:

> "For supply-side projects whose design capacity is not greater than five megawatts, or one percent of the host company's annual peak demand, whichever is lower, the project developer may enter into long-run standard contract B. The company shall offer a purchase price, through long-run standard contract B, equivalent in value, on a present-worth basis, to the weighted average stream of contractually-set prices paid to all of the project developers from the most recent final award group. The Company shall offer a variety of appropriate pricing formulas (e.g., floor price with escalating pricing provisions, levelized, fixed escalation, composite, derived heat rate, etc.) through long-run standard contract B. A project developer selecting this option does not have to participate in the solicitation process." 220 C.M.R. § 10.07(1)(a).

denied any obligation to sign a contract with PREA for power from the proposed project (id.).

PREA states that Commonwealth's most recent final award group was its RFP 2 award group and that PREA's contract price should be equivalent to the weighted average stream of prices paid to Commonwealth's RFP 2 award winners, which signed contracts with Commonwealth in February 1992 (PREA Memorandum at 19-20). PREA asserts that the RFP 2 award group price is the correct price to apply in this instance, because it was the Company's most recent solicitation award group and the IRM regulations were promulgated as a "continuous, logical extension of the power solicitation program which was ongoing under the [Department's qualifying facility] QF regulations."[3] To support its assertion, PREA cites Department decisions in the rulemaking proceeding that resulted in the IRM regulations, D.P.U. 86-36-F and D.P.U. 89-239 (PREA Reply at 14). PREA further asserts that a price based on the RFP 2 award group would not be outdated because the final award group was announced in April 1991, and the resultant contracts were signed in February 1992[4] (PREA Memorandum at 19-20).

PREA maintains that the fact that circumstances have changed regarding the need for power are irrelevant, citing the Department's Order in Petition of Altresco Lynn, Inc., D.P.U. 91-142 (1991) ("Altresco") (id. at 24). PREA also notes that Commonwealth initially refused to sign contracts with its RFP 2 award winners until ordered to execute those

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[3] The Department's QF regulations are set forth at 220 C.M.R. §§ 8.00 et seq.

[4] Commonwealth signed RFP 2 contracts with Altresco Lynn, Inc., Altresco Pittsfield, L.P., and MASSPOWER in February 1992.

contracts by the Department in Altresco (id. at 20). PREA asserts that in Altresco the Department rejected the same arguments raised by Commonwealth that Commonwealth now presents to justify refusing to sign a contract with PREA, i.e., that Commonwealth does not need the additional power and that the contract price sought by PREA would not be least-cost (id. at 20-21).

PREA also asserts that there is no genuine issue of material fact in dispute and requests expedited summary judgment of this matter, citing 220 C.M.R. § 1.06(6)(e); Hull Municipal Light Plant, D.P.U. 87-19-A at 25 (1990); and IMR Telecom, D.P.U. 89-212, at 11 (1990).

B. Commonwealth

Commonwealth asks the Department to deny the PREA Petition for the following reasons: (1) under the circumstances, application of 220 C.M.R. § 10.07(1)(a) would be contrary to the purposes of PURPA and IRM, because the power is not needed and the price would be excessive; (2) PREA's request for execution of this contract should be treated as an "out-of-cycle" proposal[5] and not approved without an investigation that determined the need for the power and an appropriate price; and (3) if the Department determines that 220 C.M.R. § 10.07(1) does apply, then Commonwealth should be granted an exception from this requirement (Commonwealth Memorandum at 2, 7-20). In addition, Commonwealth

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[5] An out-of-cycle proposal is one that is considered outside the normal IRM review process. The Department determined that out-of-cycle proposals are appropriate for (1) emergency and short-term purchases, (2) unique resource opportunities that may not be available during the normal IRM cycle, and (3) supply-side resources less than 5 MW or one percent of the host utilities annual peak demand. IRM Rulemaking, D.P.U. 89-239 at 44-47.

argues that the Motion should be denied because it asserts that PREA has established neither the absence of genuine issues of material fact, nor that irreparable harm would be incurred without summary judgment.

Specifically, Commonwealth asserts that execution of the contract at RFP 2 prices is contrary to the purposes of the Department's IRM regulations, 220 C.M.R. §§ 10.00 et seq., which are to provide a least-cost, reliable supply of electricity at a cost that is just, reasonable, and required by the public interest (citing 220 C.M.R. § 10.01) (id. at 10-12). The Company asserts that it has no need for additional capacity for over 10 years (id. at 12-13).

Commonwealth also argues that execution of a contract with PREA at RFP 2 prices would be in excess of its current avoided costs and thus would not be least-cost (id. at 2, 10-11). Commonwealth asserted that the Department has explicitly rejected application of outdated avoided costs, citing Commonwealth Electric Company, Letter Order, July 9, 1987, regarding Tondu Energy Systems, Inc. ("Tondu") (Commonwealth Reply at 8). Commonwealth argues that because such an excessive price is contrary to the purposes of PURPA and IRM, the PREA contract should not be imposed upon the Company (Commonwealth Memorandum at 2, 10-11). Commonwealth maintains that PURPA requires contract rates with developers to be just and reasonable and not in excess of the utility's full avoided cost (citing 16 U.S.C. § 824a-3(b)) (id. at 7-8). Commonwealth asserts that the cost of the PREA contract at the weighted average price of the RFP 2 award group would exceed

its current avoided cost by $1.8 million over 20 years[6] (id. at 2). Instead, the Company states that it offered to purchase power from PREA at Commonwealth's short-run energy purchase rate until the Company needs additional capacity (id. at 6, 13).

Commonwealth further asserts that 220 C.M.R. § 10.07(1)(a) does not require the Company to contract for power at RFP 2 prices, because Section 10.07(1)(a) refers to the "most recent [IRM] final award group" and not to the most recent award group from a QF solicitation under 220 C.M.R. §§ 8.00 et seq. (id. at 19-20). The Company asserts that it should be required to purchase at most only one MW of power from PREA at RFP 2 prices, since the maximum size for eligibility for a Long-Run Standard Contract B under the QF regulations was only one MW (id. at 19).

In addition, Commonwealth argues that the PREA Petition should be considered as an out-of-cycle proposal (id. at 11). Under IRM, the Company asserts that contracts proposed between IRM cycles are "exceptional" and must be justified as needed and least-cost by the proponent on a case-by-case basis (id. at 11-12).

Alternatively, Commonwealth argues that because the PREA contract at RFP 2 prices would be contrary to the purposes of both PURPA and IRM, the Department should grant an exception to 220 C.M.R. § 10.07(1) pursuant to 220 C.M.R. § 10.07(5) (id. at 12).[7] The

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[6] This calculation was presented in the affidavit of Michael Kirkwood, dated June 1, 1992. In response to a Department information request, the Company updated this calculation and projected the net loss as $6,143,733 over 20 years (Company Response to DPU-1-1, October 22, 1992).

[7] Commonwealth also acknowledges the "high costs of electricity and financial difficulty of tenants" of the mall, but asserts that this situation has been exacerbated

(continued…)

Company distinguishes the present case from the Altresco decision cited by PREA by noting that PREA has not had the substantial involvement and expense of participating in a full competitive solicitation (id. at 13-18). Commonwealth also argues that in Altresco, Altresco obtained certain rights as a member of the award group as distinguished from a developer negotiating with the utility outside the RFP process (id. at 17). Commonwealth further notes that in Altresco, unlike here, the Company initially had a short-term need for additional energy and then circumstances changed (id. at 14 n. 4). Here, Commonwealth asserts that PREA has never established any Company need for power either at the time PREA petitioned the Company or later (id.).

III. ANALYSIS AND FINDINGS

To resolve this dispute by summary judgment, the Department must determine as a matter of law (1) whether IRM regulations, and specifically 220 C.M.R. § 10.07(1)(a), apply to the PREA proposal, and if so, (2) what is the appropriate price for PREA to receive from the Company for a long-run standard contract B.

A. Application of 220 C.M.R. § 10.07(1)(a)

The IRM regulations cancel and replace the long-term contracting provisions of the QF regulations.[8] See 220 C.M.R. §§ 8.05(1)(b), 10.01(c), 10.07(1). The IRM regulations

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[7](…continued)
by the mall's own "questionable practice (the subject of a consumer inquiry to the Company) of reselling electricity to mall tenants at an unregulated price at least 25 percent above the price charged by the Company" (Renzi Affidavit at 4).

[8] The IRM regulations also expand the eligibility of certain very small power producers for Long-Run Standard Contract B. See discussion in Section IV. B., below.

provide that the long-term contracting portion of the QF solicitation regulations, i.e., 220 C.M.R. § 8.05, shall have no force or effect as of the "implementation date" of the IRM regulations, which for Commonwealth is the date of its first Phase I IRM filing. 220 C.M.R. § 10.01(c); D.P.U. 89-239, at 86 n.40, 91 n.45. Commonwealth submitted the draft initial filing in its first IRM proceeding on November 15, 1991. PREA initiated discussions with the Company regarding the proposed project two months after that date, and PREA submitted its formal offer to Commonwealth three months later. Therefore, the Department finds that, based on the foregoing undisputed facts and as a matter of law, the IRM regulations and, specifically 220 C.M.R. § 10.07(1)(a), apply to PREA's proposal. Based on our review of the filings and pleadings in this case, the Department finds that there is no genuine issue of material fact regarding whether 220 C.M.R. § 10.07(1)(a) would apply to the PREA proposal. The Department also finds that the filings and pleadings show that a hearing in this case could not affect this finding.

B. Price of Long-Run Standard Contract B under 220 C.M.R. § 10.07(1)(a)

To determine whether 220 C.M.R. § 10.07(1)(a) would require that Commonwealth's RFP 2 award group prices be the basis for pricing to PREA, it is necessary first to review the language of that regulation. The language of a regulation should be interpreted according to its plain meaning. Morin v. Commissioner of Public Welfare, 16 Mass. App. Ct. 20, 24 (1983) ("Morin"); See also, United States v. American Trucking Association, Inc., 310 U.S. 534, 543 (1940). Where ambiguity exists, it should be interpreted if possible "to make [the regulation] effectual … in harmony with common sense and sound reason [cites omitted]." Morin, 16 Mass. App. Ct. at 25.

The Department's IRM regulations state that a "company shall offer a purchase price, through long-run standard contract B, equivalent in value, on a present-worth basis, to the weighted average stream of contractually-set prices paid to all of the project developers from the most recent final award group." 220 C.M.R. § 10.07(1)(a). Since Commonwealth has had no "final award group" in IRM, PREA asserts that the RFP 2 award group price should apply, because it was the Company's most recent award group and IRM evolved from the QF solicitation process.

While PREA's argument has some merit, Commonwealth presents a more persuasive analysis. As noted in Section III.A, above, the IRM regulations cancel and replace the long-term contracting provision of the QF regulations. In addition, the IRM regulations do not state that the most recent QF award group price should apply until the Company's first IRM final award group is identified. Unlike the IRM regulations, the QF regulations do not refer to a "final award group." Furthermore, it would be inappropriate to apply the prices developed from the QF regulations without also applying the one MW capacity cap established in the QF regulations.

Therefore, it is appropriate to examine the purposes of IRM and PURPA to determine whether PREA is entitled to the RFP 2 prices. IRM is explicitly intended to establish a process that identifies and acquires the least-cost energy resources available to a company. D.P.U. 89-239 at 45; D.P.U. 86-36-G at 52; D.P.U. 86-36-F at 41, 44. Unlike the QF solicitation process, IRM solicitations include proposals for utility generation and DSM programs and thus should yield more competitive prices than bids from QFs alone.

Commonwealth also emphasizes that PURPA does not require a utility to sign a contract in excess of its avoided cost. 16 U.S.C. § 824a-3(b)(d); 18 CFR § 292.304(f).

There is no dispute that Commonwealth has had no final IRM award group or that the Company has no current need for capacity.[9,10] Therefore, the Department finds that PREA is not entitled to the RFP 2 prices which include capacity payments. Consequently, based on the foregoing undisputed facts and as a matter of law, the Department finds that PREA is entitled only to Commonwealth's short-run energy purchase rate.[11] Furthermore, the Department determines that the appropriate price for the PREA contract is the Company QF rate available at the time PREA first approached the Company, i.e., the rate for the first quarter of 1992, which was established in D.P.U. 91-3D.[12]

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9 The Department recently confirmed that the Company does not have any need for additional capacity until 2001. Cambridge Electric Light Company and Commonwealth Electric Company, D.P.U. 91-234 (1993).

10 PREA does not dispute the Company's contention that it has no need for power, but asserts that the Company's need for capacity is irrelevant, citing Altresco. However, Altresco is not controlling because (1) PREA did not participate in the RFP process, (2) Commonwealth had no need for power at the time PREA sought to contract, and (3) this ruling should have no adverse consequences on the independent power generation market over the long-term, because PREA is not the winner of a solicitation.

11 As noted above, when PREA first approached Commonwealth, the Company offered to purchase power from PREA at its short-run energy purchase rate.

12 The rates established in D.P.U. 91-3D are applicable in this case, because PREA first requested a contract with Commonwealth in the first quarter of 1992, and the litigation of this contract dispute before the Department has extended from 1992 until the issuance of this Order.

Based on our review of the filings and pleadings in this case, the Department finds that there is no genuine issue of material fact regarding which price should apply to the PREA proposal. The Department also finds that the filings and pleadings show that a hearing in this case could not affect this finding.[13]

[13] PREA's request for attorney's fees from Commonwealth is denied, because the Department lacks the authority to grant such a request.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That the request for summary judgment submitted by Plymouth Rock Energy Associates, L.P., on May 18, 1992, be and hereby is GRANTED; and it is

FURTHER ORDERED: That Plymouth Rock Energy Associates, L.P., is entitled to enter into a long-run standard contract B, pursuant to 220 C.M.R. § 10.07(1), with Commonwealth Electric Company at a price based on the Company QF rate available for the first quarter of 1992, as established in D.P.U. 91-3D.

By Order of the Department,